89-1985

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID A. ROSENFELD
875 Battery Street, 3d Fl.
San Francisco, CA 94111

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900
Attorney for California State Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the states are precluded by the preemption provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, from requiring that public works contractors agree to provide training opportunities for apprentices in accord with state-prescribed standards.

2. Whether, under this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 465 U.S. 85 (1983), preemption of a state law that was enacted as part of a cooperative federal/state program under the federal apprenticeship training statute, and that requires contractors to provide training opportunities on public works projects, would "impair a law of the United States" within the meaning of ERISA's "savings clause" (29 U.S.C. § 1144(d)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners California Division of Apprenticeship Standards, *et al.*, defendants in the district court and appellants in the court of appeals, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Northern California Boilermakers Local Joint Apprenticeship Committee, et al. v. Hydrostorage, Inc.*, 891 F.2d 719 (9th Cir. No. 88-2798, December 6, 1989).

OPINIONS BELOW

The opinion of the court of appeals is reported at 891 F.2d 719 and is reprinted in the separately bound appendix to this *certiorari* petition (hereafter App., *infra*) at pp. 1a-28a. The opinion of the district court (App., *infra*, 29a-44a) is reported at 685 F.Supp. 718.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 45a) was entered on December 6, 1989. A timely petition for rehearing was denied on March 16, 1990 (App., *infra*, 46a-47a). The district court had jurisdiction over this matter under 28 U.S.C. § 1331, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*; the National Apprenticeship Act of 1937 ("Fitzgerald Act"), 29 U.S.C. § 50, and regulations promulgated thereunder, 29 C.F.R. § 29.1 *et seq.*; the California Labor Code § 1777.5, § 1777.7 and §§ 3070-3097; and the California Code of Regulations, 8 C.C.R. § 201 *et seq.* The relevant statutory and regulatory provisions are set forth at App., *infra*, 48a-77a.

STATEMENT OF THE CASE

This case arises out of provisions in the California prevailing wage statute that require employers performing public works contracts for the state or its subdivisions to agree to employ and train apprentices pursuant to state-approved apprenticeship standards. In 1986, respondent Hydrostorage, Inc. was awarded a contract to erect a water storage tank for the Lathrop County Water District in Lathrop, California. Although the contract contained provisions for apprenticeship training in accord with state law, Hydrostorage failed to comply with its promises concerning such training. The state entered an order barring Hydrostorage from bidding on public contracts for one year and assessing a civil penalty. The court below held the state's order to be preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

1. Section 3075.1 of the California Labor Code provides that "[i]t is the public policy of [the] state to encourage the utilization of apprenticeship as a form of on-the-job training, when such training is cost effective, in developing skills needed to perform public services" (App., *infra*, 57a). To that end, under § 1777.5 of the California Labor Code, the state will select as public works contractors only those employers who agree that, whenever workers in an apprenticeable craft or trade are employed, the employer will also employ apprentices "who are in training under [state-approved] apprenticeship standards and . . . apprentice agreements" (App., *infra*, 50a).

"Apprenticeship standards" and "apprentice agreements" are terms of art with specific meaning in the cooperative federal/state scheme governing the promotion of apprenticeship training in skilled trades generally.[1]

---

[1] In the National Apprenticeship Act of 1937, 29 U.S.C. § 50, commonly known as the Fitzgerald Act, Congress directed the Secretary of Labor to "formulate and promote the furtherance of labor standards" for apprenticeship and "to cooperate with State agencies engaged in the formulation of programs of apprenticeship." App., *infra*, 49a. Pursuant to that Act, the Secretary of Labor has promulgated regulations setting forth criteria for defining apprenticeable occupations and minimum standards governing apprenticeship training. The regulations, which are codified at 29 C.F.R. §§ 29.1-29.13 and reproduced in relevant part at App., *infra*, 61a-75a, encourage the development by employers and labor organizations of apprenticeship training programs, and establish a procedure by which programs meeting federal minimum standards may be approved by the federal Bureau of Apprenticeship Training as eligible for federal assistance and certification and for other federal purposes, including as a source of training for apprentices hired on federal public works projects. App., *infra*, 61a-62a.

Consistent with the statutory mandate, the federal regulations enlist the states in the promotion of apprenticeship training by providing for the approval by the Secretary of state apprenticeship councils ("SACs") in states that have adopted apprenticeship laws and regulations meeting the federal minimum requirements. The regulations delegate to an approved SAC the responsibility for certifying local apprenticeship programs, and provide that programs meeting the requirements of an approved SAC shall be

Under that scheme, apprenticeship training is conducted by private program sponsors—typically either a joint labor-management apprenticeship committee, a unilateral management or labor committee, or an individual employer—pursuant to written specifications, or standards, approved by the relevant state or federal authority. There may be more than one approved local apprenticeship committee administering apprenticeship standards in a particular area. The terms and conditions of apprenticeship training, including the number of hours an apprentice will work, the wages to be paid, the training program to be provided, and the like, are set forth in a written apprentice agreement between each apprentice and the program sponsor or employer. App., *infra*, 2a-3a, 50a-77a.

To receive state approval in California, apprenticeship standards and apprentice agreements must meet the requirements set by the California Apprenticeship Council ("CAC"), an appointed body which hears appeals from and sets policy for the Division of Apprenticeship Standards ("DAS"). In 1974, the CAC and DAS approved apprenticeship standards for trades involved in the construction of water storage facilities; those standards are contained in a document entitled "Boilermakers Standards of Apprenticeship for Field Construction and Repair in Eight Western States Area" (hereafter "Standards"). App., *infra*, 2a-3a, 34a.

Section 1777.5 of the California Labor Code requires that an employer who is awarded a public works contract must apply to the joint apprenticeship committee administering the applicable apprenticeship standards in the area of the project for approval to employ and train apprentices in accordance with those standards (App., *infra*,

---

deemed to satisfy the federal standards. App., *infra*, 63a-75a. California's apprenticeship law, the Shelley-Maloney Act of 1939, Cal. Labor Code § 3070-3097, is one of 26 state laws that have received federal approval under the Fitzgerald Act scheme.

3a-6a, 31a-33a, 50a-53a).[2] In this case, the Northern California Boilermakers Joint Apprenticeship Committee ("Boilermakers JAC") administers the Standards in the Lathrop area.

Finally, the statutory scheme requires only that a public works contractor *apply* for approval from the local apprenticeship committee; if approval is denied, the employer may perform the contract without conducting apprenticeship training. Section 1777.5 of the California Labor Code requires, however, that upon receiving approval the contract must employ apprentices in a ratio of not less than one apprentice for every five journeymen. App., *infra*, 5a-6a, 32a-33a. The contract between Hydrostorage and Lathrop County incorporated the requirements of § 1777.5. However, Hydrostorage did not apply to the Boilermakers JAC for a certificate of approval to train apprentices, and did not employ apprentices in the ratio established in § 1777.5. App., *infra*, 7a, 34a.

Section 1777.7 of the California Labor Code subjects a contractor to civil penalties and to a one-year debarment from bidding on public works contracts for willful noncompliance with the contract provisions required by that provision. After an administrative proceeding, the DAS found that Hydrostorage had violated § 1777.5 by failing to apply for approval to employ and train apprentices in accordance with the Standards.[3] The CAC

---

[2] Employers who are signatory to a collective bargaining agreement with the International Brotherhood of Boilermakers agree thereby to adhere to the Boilermakers Standards in the employment and training of apprentices. App., *infra*, 2a-4a. Other employers may already have their own single-employer apprenticeship program whose standards have been approved. In either of these cases the employer need not apply to the local joint apprenticeship committee for approval under § 1777.5. Hydrostorage was not signatory to a collective agreement incorporating the Standards, and did not have state approval to operate its own apprenticeship training program. App., *infra*, 3a-4a. Hydrostorage was therefore required to apply for a certificate of approval under § 1777.5.

[3] The administrative complaint had charged that Hydrostorage also failed to make certain monetary contributions required by

ordered that Hydrostorage be barred for one year from bidding on public works contracts in California, and that it pay a civil penalty. App., *infra*, 7a-8a, 34a, 54a.

3. The district court held that this administrative order was preempted by ERISA.[4] That court found that the Boilermakers apprenticeship program, as set forth in the Standards, is an employee benefit plan within the coverage of ERISA, and that the order "relates to" and "regulates" an employee benefit plan, and is therefore preempted under § 514(a) of ERISA, 29 U.S.C. § 1144(a), because the order compels Hydrostorage "to participate in and contribute to the . . . Program." App., *infra*, 34a-36a. The district court found further that the administrative order was not saved from ERISA preemption by § 514(d), 29 U.S.C. § 1144(d)—which precludes preemption that would "impair" a law of the United States—because, in that court's view, § 1777.5 of the California Labor Code "is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired" (App., *infra*, 38a).[5]

---

§ 1777.5, but the DAS found that in fact the employer had made the required payments. App., *infra*, 78a. There is therefore no question in this case concerning any state monetary contribution requirement.

[4] Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Section 514(c)(1) defines the term "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). Section 514(c)(2) then defines the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2).

[5] The district court also found the administrative order to be preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.*, based on the mistaken belief that § 1777.5 required the employer to become party to a collective bargaining agreement. App., *infra*, 41a-44a. The court of appeals did not

4. The court of appeals upheld the judgment of the district court. That court noted that the statutory definition of an employee welfare benefit plan includes a " 'plan, fund or program . . . established . . . for the purpose of providing . . . apprenticeship or other training programs,' " and concluded that both the local apprenticeship training trust fund in the Lathrop area and the Boilermakers Apprenticeship Standards in their entirety constituted ERISA-covered plans. App., *infra*, 16a-19a. The court below stated that, to be preempted, a state law or regulation must both "relate to" an ERISA plan under § 514(a) of ERISA and "purport to regulate" a plan within the meaning of § 514(c)(2). That court reasoned that the "purports to regulate" language of § 514(c)(2) is narrower than the "relate to" language of § 514(a), and thus imposes a substantive limit on the scope of the preemption clause of § 514(a). App., *infra*, 21a. The court below nonetheless found that the administrative order here came within both clauses by "requir[ing] Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan" (App., *infra*, 22a-23a).

In so finding, the court below rejected the argument that, because § 1777.5 of the California Labor Code "applies only when the state is purchasing services in the marketplace, and simply expresses a decision as to the terms upon which the state chooses to do business," that provision represents an exercise of the state's proprietary prerogative as a "market participant," and does not constitute "regulation" of any plan covered by ERISA. App., *infra*, 23a. Citing *Wisconsin Department of Industry v. Gould. Inc.*, 475 U.S. 282 (1986), that court found that "the 'market participation' doctrine reflects the particular concerns underlying the Commerce Clause," but does not apply in determining whether state action is preempted

---

reach the issue of NLRA preemption, and that issue is not raised in their *certiorari* petition.

in a case where Congress has itself passed legislation. App., *infra*, 23a. In addition, the court below found that, because "[t]he state's involvement does not end with the awarding of the contract" but also includes monitoring and enforcing violations of contracts, the requirements of § 1777.5 "amount[] to regulation, not merely 'market participation.'" App., *infra*, 23a-24a.

Finally, the court below found that § 1777.5 is not saved from preemption by ERISA § 514(d) which protects against the impairment of federal law. That court, based on its reading of this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), found that § 514(d) applies only to save state law provisions that are designed to enforce *prohibitions* contained in federal statutes, such as the state provisions at issue in *Shaw* prohibiting conduct also prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The court below concluded that § 514(d) does not reach incidents of "cooperative federalism," such as that embodied in the Fitzgerald Act, wherein state laws promote substantive conduct that federal law affirmatively seeks to encourage; in its view, such a result would amount to "an overbroad reading of *Shaw*." App., *infra*, 24a-27a.

REASONS FOR GRANTING THE PETITION

I. The Question Whether ERISA Preempts The States From Setting Employee Training Requirements And Other Labor Standards In Public Works Contracts Raises A Substantial And Recurring Issue On Which The Court Of Appeals' Law Is In Disarray.

A.(1) The ERISA preemption cases that have been decided by this Court have concerned state regulatory enactments of general application that set norms stating what private parties may lawfully do in their dealings with other parties both private and public. The inquiry has been whether such a state regulation "relates to" the operation of employee benefit plans, either directly or in-

directly, in a way that transgresses ERISA's prohibition on such "conflicting or inconsistent State and local regulation," (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983)).

The decision below, in contrast, extends the preemptive reach of ERISA to a state rule that applies *only* to transactions in which the state is purchasing services in the marketplace; *viz.*, to a rule that private parties may ignore unless and until those parties voluntarily contract with the state.

The particular apprenticeship training requirement involved here, for example, reflects the state's interest in using its resources to stimulate development of a skilled workforce available for employment on future public projects. By requiring that all employers who contract to build public projects with public funds participate in training apprentices, the state increases the number of trained craftmen in the workforce; ensures in particular that training occurs on the kinds of projects typically contracted for by public entities; and protects those employers who do participate in the training of future skilled workers from a disadvantage in bidding on public contracts based on a difference in apprenticeship costs.

Nothing in the state's apprenticeship standards for public contractors requires that the contractors violate any substantive ERISA requirement, and *nothing* in those standards goes beyond requirements that private contractors could lawfully set in letting their own contracts.

The decision below nonetheless *precludes* the states from purchasing apprenticeship training on the foregoing terms, and may well preclude the states from enforcing other kinds of contract provisions pertaining to apprenticeship training on public works.[6] The scope of the deci-

---

[6] Indeed, recent decisions have found preempted apprenticeship training provisions in public works procurement statutes in Washington and Nevada. *Local 598 Plumbers and Pipefitters Industry*

sion is not, moreover, limited to apprenticeship training requirements. Many states require as part of their prevailing wage statutes that contractors doing work for the state pay wage "supplements" reflecting the costs of various other employee benefits.[7] Such requirements, no less than the apprenticeship training requirement involved here, are a traditional exercise of the states' proprietary power to set standards in the labor market from which

---

Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir.), *affd. summ.*, —— U.S. ——, 109 S. Ct. 210 (1988) (ERISA preempts a Washington statute requiring a public works contractor to pay the prevailing rate of contributions to a local apprenticeship training fund as part of the "prevailing rate of wage" in the relevant locality); *Associated Builders and Contractors, Inc. v. MacDonald*, 11 EBC (BNA) 2625 (D. Nevada 1989) (ERISA preempts a Nevada requirement that public works contractors pay the prevailing journeymen's wage to apprentices unless the employer employs apprentices pursuant to a state-approved apprenticeship training program).

[7] The following states require the payment of prevailing wage supplements by public works contractors:

Alaska, Alaska Stat. § 36.95.010(7) (1982); California, Cal. Lab. Code § 1773.1 (West 1989); Connecticut, Conn. Gen. Stat. § 31-53 (1987); Hawaii, Haw. Rev. Stat. § 104-1 (1985); Illinois, Ill. Ann. Stat. Ch. 48, para. 395-2 (Smith-Hurd 1986); Kansas, Kan. Stat. Ann. § 44-201; Kentucky, Ky. Rev. Stat. Ann. § 337.505 (Bladwin 1983); Maryland, Md. State Fin. & Proc. Code § 17.208 (1988); Massachusetts, Mass. Gen. Laws Ann. ch. 149, § 27 (West 1982); Michigan, Mich. Comp. Laws § 408.552 (1985); Minnesota, Minn. Stat. Ann. 177.42 (West 1989); Missouri, Mo. Ann. Stat. § 290-210 (Vernon 1989); Montana, Mont. Code Ann. § 18-2-403 (1989); Nevada, Nev. Rev. Stat. § 338.010 (1989); New Jersey, N.J. Stat. Ann. § 13-4-11 (1989); Ohio, Ohio Rev. Code Ann. § 4115.03 (Page's 1980); Oklahoma, Okla. Stat. Ann. tit. 40, § 276a-5 (West 1980); Oregon, Or. Rev. Stat. § 279.348 (1987); Pennsylvania, Pa. Stat. Ann. tit. 43, § 165-7 (Purdon 1964); Rhode Island, R.I. Gen. Laws § 37-13-6 (1984); Texas, Tex. Lab. Code Ann. § 5159a (Vernon 1987); Washingon, Wash. Rev. Code Ann. § 39.12.010 (1972); Wisconsin, Wis. Stat. Ann. § 103.39 (West 1988); Wyoming, Wyo. Stat. § 27-4-405 (1977).

the states draw for public works employment. Yet the principle applied by the lower court could lead to ERISA preemption of those requirements as well.[8]

Recognizing the importance of safeguarding the states' right to contract for goods and services free of federal constraints, this Court has on several occasions considered whether the Commerce Clause of the Constitution standing alone interferes with the states' freedom in the market; distinguishing state regulatory actions from state market participation, the Court has concluded that there is no Commerce Clause constraint on the latter. *See White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v, Alexandria Scrap Corporation*, 426 U.S. 794 (1976)). At the same time, in a case under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* —*Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986)—the Court concluded that under the particular circumstances involved, the regulation/market participation distinction was not controlling in deciding the statutory preemption issue there presented.

This case presents the opportunity to consider, in an entirely different statutory context than the one in *Gould*, whether the regulation/market participation distinction developed in the Commerce Clause cases applies, as well, in statutory preemption cases and, if so, under what circumstances. The fact that this question arises in an ERISA context makes it particularly significant. Given the predominance of employee benefit plans in the modern economy, the states, in making purchasing and contracting decisions are likely for any of a myriad of reasons—having to do with concern for the health and welfare

---

[8] *See General Electric Company v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. den.*, —— U.S. ——, 58 L.W. 3767 (June 4, 1990) (holding prevailing wage provisions preempted by ERISA insofar as such provisions affect employee benefit plans, and doing so without discussing § 514(c)(2) whose pertinence we demonstrate at pp. 12-15 *infra*.)

of employees working on public works jobs, or, as here, the state's self-interest in assuring a skilled workforce—to consider the nature of the contractors' benefit programs in letting contracts.

(2) Review of the decision below also is required to resolve the substantial confusion that has developed in the court of appeals law over the proper role—and the proper construction—of ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2), in preemption litigation generally.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Section 514(c)(2) in turn, defines "State" for purposes of § 514 generally as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which *purports to regulate* . . . employee benefit plans . . ." (emphasis supplied).

The question of the proper interaction of these two sections, and the further question of the precise meaning of § 514(c)(2), are critical to the development of the ERISA preemption doctrine. And those questions are ones this Court has not yet addressed in any detail, and upon which the court of appeals' decisions are in disarray.[9]

On the one hand, most courts continue to ignore the "purports to regulate" language of § 514(c)(2) entirely in ERISA preemption cases, and to approach the question whether a state rule is preempted purely as a question of whether the rule "relates to" an employee benefit plan under § 514(a).[10] This approach serves to *expand*

---

[9] The only case in this Court even touching on the interplay of § 514(a) and § 514(c)(2) is *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981) (relying on § 514(c)(2) to support the conclusion that § 514(a) reaches "indirect action bearing on private pensions.")

[10] *See, e.g., Fitzgerald v. Codex Corp.*, 882 F.2d 586, 587-88 (1st Cir. 1989); *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989);

ERISA's preemptive effect since the "relates to" analysis, as this Court stated in *Shaw v. Delta Air Lines, Inc.*, *supra*, requires an inquiry only into whether the state rule "has a connection with or reference to such a plan," or whether instead the relationship is "too tenuous, remote, or peripheral . . . to warrant a finding of 'relates to' the plan." 463 U.S. at 97, 100 n.21.

Other courts, including the court below, have held that the "purports to regulate" language of § 514(c)(2) does, indeed, *limit* the preemptive scope of ERISA, by imposing an additional requirement for preemption to the "relates to" requirement of § 514(a).[11]

At the same time, even those courts that have determined that § 514(c)(2) does limit the scope of § 514(a) have failed to flesh out the substance of that limitation in any consistent, meaningful way. For example, although the court below found that § 514(c)(2) imposes an additional and more confining test for preemption than does § 514(a), that court offered no sensible view of what the "purports to regulate" language actually *adds* to the "relates to" test, and ultimately found that the California apprenticeship training provision "purports to regulate" employee benefit plans for no reason other than that the

---

Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F.2d 419, 421 (4th Cir. 1985), *cert. den.*, 476 U.S. 1170 (1986); *MacLean v. Ford Motor Co.*, 831 F.2d 723, 727 (7th Cir. 1987); *Baxter v. Lynn*, 886 F.2d 182, 184 (8th Cir. 1989); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1563 (11th Cir. 1987).

[11] The Ninth and the Second circuits have expressed this view. *See Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1359 (9th Cir. 1986) ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA); *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 & n.1 (2d Cir. 1984), *cert. den.*, 472 U.S. 1008 (1985); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *affd. mem. sub nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983).

provision "relates to" such plans. App., *infra*, 21a-23a. *See also Rebaldo v. Cuomo*, 749 F.2d at 137 n.1.[12]

The most elementary canons of statutory construction indicate, too, that Congress meant to add something of substance to § 514(a)'s requirements in defining "State" in § 514(c)(2) not only according to the kind of entity covered, but *also according to whether or not that entity "purports to regulate" an employee benefit plan. Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)"). And reading §514(c)(2)'s language as referring to the established distinction between state regulation and state market place participation is, for the reasons developed below, both sensible and consistent with this Court's cases. See pp. 16-21, *infra*.

Standing alone, the "relates to" language of § 514(a) is so imprecise as to provide little guidance to the courts in determining ERISA preemption questions. Congress apparently so recognized, and therefore provided that guidance in part in § 514(c)(2). Until this Court settles the meaning of § 514(c)(2), the confusion in the lower courts as to the scope of ERISA's preemption provisions taken as a whole will continue. To elucidate the inter-

---

[12] The Sixth Circuit, without deciding the question, has criticized the view that the "purports to regulate" language of § 514(c)(2) provides a substanitve limitation on the scope of § 514(a). *Authier v. Ginsburg*, 757 F.2d 796, 799 n.4 (6th Cir.), *cert. den.*, 474 U.S. 888 (1985); *see Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 552-53 n.1 (6th Cir. 1987). Similarly, the Fifth Circuit, while noting the Ninth and Second Circuits' view, has expressly declined to adopt the position that the "purports to regulate" language of § 514(c)(2) limits the preemptive reach of ERISA. *Ironworkers Mid-South Pension Fund v. Tero-technology*, 891 F.2d 548, 552 (5th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Plan v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467 n.9 (5th Cir. 1986).

relation of § 514(a) and § 514(c)(2) while addressing the important practical question of the application of ERISA's preemption provisions to a wide range of state contract requirements, the Court should grant review in this case.[13]

B. As we indicated at the outset the ERISA preemption question presented here requires the reconciliation of two lines of authority in this Court concerning the extent to which federal statutory enactments restrict the states in their role as market participants. We develop that point at this juncture and in so doing show why the decision below is wrong.

This Court has once before addressed a claim of federal statutory preemption in connection with labor-related standards imposed in a state contract for the procurement of goods or services. In *Wisconsin Department of Industry v. Gould, Inc., supra,* the Court held that the National Labor Relations Act preempts a Wisconsin statute barring repeat violators of the NLRA from doing business with the state.

---

[13] In *General Electric Company v. New York State Department of Labor, supra,* the Second Circuit held that ERISA preempts a New York state requirement that public works contractors pay, in addition to wages at the prevailing rate, fringe benefits or their equivalent in cash supplements "in accordance with the prevailing practices in the same trade or occupation in the locality" where the contract is to be performed. The Second Circuit's decision is of a piece with the decision below insofar as both find ERISA to preempt traditional labor standards specifications in state public works contracts. In *General Electric,* however, the state did not raise, and the decision did not consider, the issue whether the "purports to regulate" language of § 514(c)(2) limits the scope of ERISA preemption as applied to a state procurement contract requirement; instead that decision analyzed the New York prevailing wage statute *solely* under the "relates to" language of § 514(a). Thus, this case, unlike *General Electric,* presents a vehicle for addressing on a generic basis the application of ERISA preemption principles to state procurement statutes.

The court below read *Gould* as standing for the broad proposition that *any* Congressional action preempting a certain substantive area of state employment regulation applies as a matter of law to state actions as a purchaser of goods and services. We believe that this vastly overreads *Gould*, which in fact stands for a much narrower approach to the federal preemption of state procurement activities.

(1) As noted above the *Gould* Court started from the proposition, established in a series of decisions under the "dormant" Commerce Clause, that a state is generally free, in its role as "market participant," to set the terms on which the state will contract for goods and services with private parties, and that a state in filling that role may require contract terms, including labor-related terms, that the state might not be free to impose by across-the-board regulation. *See* 475 U.S. at 289, *citing White v. Massachusetts Council of Construction Employers, supra; Reeves, Inc. v. Stake, supra; Hughes v. Alexandria Scrap Corporation, supra.* The basis for this freedom is that legal rules restricting "state regulatory measures impeding free private trade in the national marketplace" have no necessary application to "the ability of the States themselves to operate freely" in that marketplace. *Gould*, 475 U.S. at 289, *quoting Reeves*, 447 U.S. at 437.[14]

The *Gould* Court found, however, that in enacting its debarment rule "Wisconsin 'simply [was] not functioning as a private purchaser of services,'" so that, "for all practical purposes, Wisconsin's debarment scheme [was] tantamount to regulation." 475 U.S. at 289. There is no indication in the NLRA, said the Court in *Gould*, that

---

[14] Moreover, in *White v. Massachusetts Council of Constructions Employers*, the Court discussed, in particular, state procurement rules concerning the employees of contractors on public works and noted that the employees of such contractors are "in a substantial if informal sense, 'working for the [state].'" 460 U.S. at 211 n.7.

Congress intended to allow a state to enact such a purely regulatory regime in the guise of a procurement statute.

Three principles guided this Court to its conclusion in *Gould*. First, as the Court made clear, in determining whether a particular form of state activity is preempted by a federal labor statute, Congressional purpose is the ultimate "touchstone" as it is in any preemption analysis (475 U.S. at 290), and that purpose must be gleaned from the *particular* state and federal statutory schemes at issue. As the Court explained:

> We do not say that state purchasing decisions may never be influenced by labor considerations . . . . Doubtless some state spending policies, like some exercises of the police power, address conduct . . . such . . . that preemption should not be inferred. And *some spending determinations that bear on labor relations were intentionally left to the States by Congress.* [475 U.S. at 291 (citations omitted, emphasis supplied).] [15]

Second, in determining Congressional intent, the *Gould* Court considered whether the state statute in question "can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." 475 U.S. at 291. Because the Wisconsin scheme

---

[15] Indeed, the Court has explained in another context that federal statutes which would preempt state *regulatory* action will often *not* preempt state action taken in a *purely proprietary* capacity. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973) (federal airport noise control legislation that was intended to occupy the field of state and municipal airport noise regulation did not preclude a municipality from setting noise requirements in its capacity "as the proprietor of an airport). *See also Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 2901 (1988) (suggesting that a city acting in its proprietary capacity could insist, in a franchise agreement for the operation of an oil pipeline, on safety requirements greater than those imposed by the federal Hazardous Liquid Pipeline Safety Act, notwithstanding the otherwise broad preemptive scope of the federal act).

was addressed to employer conduct unrelated to the employer's performance of any contractual obligations to the state and unrelated to the specific objects of any state purchasing decision, the *Gould* Court concluded that the state law was only in form a procurement statute.[16]

Finally, the Court in *Gould* held that the distinction between regulation and market participation "reflects the particular concerns underlying the Commerce Clause;" *viz.*, the concerns in maintaining a *national* marketplace in which private parties can operate, without restricting the ability of the states to participate in that marketplace coequally with private parties. *See* 475 U.S. at 289. By contrast, said the *Gould* Court, the NLRA was designed to create and protect an affirmative and comprehensive federal regulatory regime, so that the question "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place." *Id.* at 290.

Applying these three principles, the *Gould* Court concluded that there is no affirmative indication that Congress intended in *enacting the NLRA* to preserve statutes such as the one at issue there (475 U.S. at 290); that the Wisconsin statute in truth constituted a state effort to "enforce the requirements of the NLRA" (*id.* at 291); and that the state statute interfered with the "'interrelated federal scheme of law, remedy, and administration'" which Congress intended to commit exclusively to the National Labor Relations Board, (*id.*, *quoting San*

---

[16] *See*, applying a similar distinction between state regulation and state market participation in a Commerce Clause context, *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984) (Alaska's interest as a market participant was limited to the "immediate transaction" involving the purchase of timber; conditions imposed on the manner in which timber is processed after the purchase is completed amounted to "downstream regulation of the timber-processing market in which [the state] is not a participant.")

Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959)).

(2) The three considerations the Court regarded as determinative in *Gould* all point in precisely the opposite direction here.

First, the language Congress wrote into ERISA's preemption provisions is, as the Court has observed, "virtually unique." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). The choice of the term "purports to *regulate*" in ERISA § 514(c)(2)—which does not appear in the NLRA or in the preemption language of any other federal statute of which we are aware—is therefore entitled to particular weight; giving that term its ordinary meaning leads ineluctibly to the conclusion that Congress meant that *only* regulatory acts, as regulation is commonly understood under federal law, and not state proprietary or market participant acts, are preempted by ERISA.

Second, the state procurement rule here at issue relates directly to how the particular contract being let is to be carried out, and not to what the contracting party did at some other time in some other place. Because § 1777.5 of the California Labor Code, unlike the Wisconsin debarment statute in *Gould*, plainly rests on perfectly legitimate "local economic needs" (475 U.S. at 291) which the provision requiring apprentice training is intended in part to serve, the California statute is not regulation in disguise, but rather a legitimate expression of the state's procurement requirements.

Third, unlike the species of NLRA preemption involved in *Gould*, preemption under ERISA is intended to serve the same general purposes as does the dormant Commerce Clause. ERISA preemption—in contrast to NLRA preemption—is not primarily concerned with regulating the content of benefit plans or even with protecting an affirmative regulatory scheme. Instead, ERISA pre-

emption is concerned with preserving uniformity in national markets by "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). *See Shaw v. Delta Air Lines*, 463 U.S. at 98-100, 105; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987).

Thus, for the purposes of both dormant Commerce Clause analysis *and* ERISA preemption analysis, it is the ability of market participants to operate freely in the national market that is to be protected, and there is no reason to preclude the states, when participating in that market, from taking actions open to private market participants. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 809; *Reeves v. Stake*, 447 U.S. at 436-39. Where a state can pursue its marketplace interests without interfering with any affirmative federal policy, it must be assumed that Congress did not intend to impede the state's " 'right . . . freely to exercise [its] own independent discretion as to parties with whom [it] will deal.' " *Id.* at 439.[17]

The Ninth Circuit, in short, read *Gould* much too broadly, and by so doing denied the states operating as

---

[17] The court below also found that the state was engaged in regulation by enforcing the specification contained in the contract that Hydrostorage agreed to and executed. This conclusion is directly contrary to this Court's decision in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). *Perkins* specifically held, in a case involving a federal prevailing wage statute, that enforcement of contracts specifying labor standards for employees of a government contractor "does not represent the exercise by [the government] of regulatory power over private business or employment." *Id.* at 127. The Court concluded that fixing and enforcing labor standards in government contracts is not regulation because "[l]ike private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.*

market participants the freedom this Court's cases allow; its erroneous decision should not be allowed to stand.

II. The Ninth Circuit's Conclusion That State Apprenticeship Statutes Are Preempted By ERISA Despite A Federal Statutory Scheme That Promotes State Programs Regarding Apprenticeship Raises Important Issues Concerning The Reach Of § 514(d) Of ERISA, As Interpreted By This Court In *Shaw v. Delta Airlines*, 465 U.S. 85 (1983), To Federal-State Cooperative Programs.

Even if benefit plan-related specifications in state public works contracts may be said generally to come within the preemptive scope of ERISA, the particular apprenticeship training scheme at issue here is valid as part of the cooperative state/federal scheme for promoting apprenticeship training called for by the Fitzgerald Act. The Ninth Circuit's failure to uphold the apprenticeship training scheme on that basis was grounded in an unduly cramped reading of § 514(d) of ERISA, 29 U.S.C. § 1144(d) (the "savings clause") squarely at odds with the principles set forth in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). If permitted to stand, the lower court's reading of § 514(d) will substantially inhibit the national program of apprenticeship training in which more than half the states participate. This aspect of the decision below—which as we now show is seriously flawed in its reasoning—independently warrants this Court's review.

Section 514(d) of ERISA provides that "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." The court of appeals found that § 1777.5 of the California Labor Code—while *promoting* the goals of the joint federal/state program of apprenticeship training under the Fitzgerald Act—does not constitute an "enforcement scheme" for federally-enacted substantive law. Reading

this Court's decision in *Shaw v. Delta Airlines, supra,* as confining the reach of § 514(d) to state statutes that directly enforce federal substantive law, the court of appeals held that § 514(d) does not save state statutes from preemption even where federal law affirmatively promotes, and specifically approves, the innovative state action sought to be preempted.

A. Congress in enacting the preemption language of ERISA, recognized that many federal statutes deal directly or indirectly with the workplace and may affect ERISA-covered plans. The language of § 514(d)'s savings clause was included in ERISA to express Congress' intent to preserve such federal statutory schemes from being undercut by ERISA preemption.

Shaw v. Delta Air Lines, Inc., supra, presented the one occasion the Court has had to consider the proper scope of § 514(d) as applied to a federal statutory scheme that relies in some respect upon *state* law to achieve a federally-prescribed employment goal. Specifically, in *Shaw,* the Court considered the relationship between a state fair employment law and the comprehensive federal anti-discrimination scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The state law in question contained certain provisions that were congruent with the prohibitions of Title VII, and other provisions that went beyond Title VII and prohibited employment practices with respect to which Title VII was neutral.

The *Shaw* Court held that, as applied to benefit plans, state law that is substantively congruent with Title VII, even if otherwise within the preemption language of § 514(a), is saved from preemption under § 514(d), because to preempt such laws would "impair" the federal goal "of encouraging joint state/federal enforcement of Title VII." 463 U.S. at 102. With respect to state law that prohibits conduct which Title VII views with neutrality, however, the Court found preemption under

§ 514(a) would not impair federal law and is therefore proper. *Id.* at 103-04. As the Court concluded, "[w]e have found no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther. . . ." *Id.* at 103 n.24.

The decision in *Shaw* confirms that, at a minimum, § 514(d) protect state laws from preemption where the law in question is a means of furthering the state's assigned role in a cooperative federal/state statutory scheme. And *Shaw* suggests further that whether a particular state law in a particular federal/state scheme is saved under § 514(d) will turn on an analysis of the federal goals and the ways in which those goals are served by the state law. Indeed, the Court made quite clear that, if there were "language or legislative history" suggesting a federal interest in having the states go beyond minimum federal standards, such evidence would be highly relevant to the application of § 514(d). *See* 463 U.S. at 103 n.24.

B. The Fitzgerald Act is a bare-bones enabling act, granting authority to the Secretary of Labor

> to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, [and] *to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship.* . . . [29 U.S.C. § 50 (emphasis added)].

Both the federal statute and the Labor Department regulations leave to the states the primary administrative responsibility for certifying local apprenticeship programs as meeting the minimum federal standards (*see* n.1 *supra*) and for adopting, if the states so choose, poli-

cies and procedures which impose requirements in addition to the minimum apprenticeship requirements prescribed by the Labor Department. 29 C.F.R. § 29.12(a)(5).[18]

Thus, the language and structure of the Fitzgerald Act demonstrate a federal policy of encouraging the states to go *beyond* federal minimums, and a policy of granting flexibility to the states in so doing.[19] In this respect, the federal statute is similar to many other federally enacted programs that set general policy goals and standards, but otherwise rely on the states to advance and administer the federal interests in various ways.[20] To preempt a state law that is in furtherance of such a federal scheme by the operation of § 514 of ERISA certainly "impairs"

---

[18] Congress has specifically encouraged, and in some instances required, the employment and training of apprentices on federal public works projects in a manner quite similar to the way in which § 1777.5 of the California Labor Code accomplishes those objectives with respect to state projects. *See Siuslaw Concrete Construction Co. v. State of Washington Dept. of Transportation*, 784 F.2d 952, 958 (9th Cir. 1986) (mandating training of apprentices on federal of federally assisted highway construction projects); Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-7; Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332; 29 C.F.R. §§ 5.1-.17 (permitting employment of apprentices at less than prevailing wage on federally financed and assisted construction, where apprentices are trained under approved apprenticeship standards).

[19] *See Rebaldo v. Cuomo, supra* (§ 514(d) applied to an experimental state Medicaid program; Congress had authorized the states to engage in innovative and experimental projects in carrying out their role under the federal Medicaid statute) (opinion of Van Graafeiland, J.).

[20] *See, e.g.*, The Job Training Partnership Act, 29 U.S.C. § 1501 *et seq.*; The Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq. See generally Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177 n.28 (1978) (recognizing that some federal statutes reflect an explicit reliance upon federal/state cooperation, and indicating that, where that is the case, the flexible role ascribed to the states is to be regarded as part of the federal statutory scheme for preemption purposes.)

and "modifies" the federal statute, by limiting the range of the states' inventiveness in furthering the federal program's goals, and such a result is thus contrary to §514 (d)'s plain "savings clause" language.

Indeed, this Court has cautioned that generally, "ERISA preemption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.' " *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 19, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 522. In the absence of clear evidence to the contrary, it must be presumed that Congress "did not intend to preempt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

State apprenticeship training requirements in public works of the kind at issue here are a central part of state prevailing wage laws that have heretofore been considered to be a "valid and unexceptional exercise of the [states'] police power." *Metropolitan Life*, 471 U.S. at 758.[21] Particularly given the degree to which the Fitzgerald Act relies on state programs as a means of encouraging apprenticeship, including the training of apprentices on public works, ERISA preemption of state apprenticeship training requirements would impair the federal statutory scheme stated in the Fitzgerald Act in the precise way § 514(d) was intended to prevent. By reading *Shaw* as nonetheless precluding enforcement of state substantive law enacted in furtherance of cooperative federalism programs such as the one at issue here, the court of appeals

---

[21] The most recent federal decision to consider a state apprenticeship training rule, implicitly rejected the decisions that have held such rules preempted in public works contracts, and held that a state standard governing the training of apprentices is "a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs." *Boise Cascade Corporation v. Peterson*, Civil 4-90-48 (D. Minn. April 27, 1990), slip op. at 17.

decided an imporant question of federal-state relations in a way that merits this Court's attention.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. ROSENFELD
875 Battery Street, 3d Fl.
San Francisco, CA 94111

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900
Attorney for California State Petitioners